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669061—45

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 33)[1] is not reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 2, 1945 (R. 33–34). The peti-

[1] The printed record filed with the petition for a writ of certiorari consists of the appendix to petitioner's brief in the circuit court of appeals, together with the transcript of the proceedings in that court. References to this document in this brief are designated "R." Petitioner has also filed a typewritten transcript of the trial proceedings. References to the transcript are designated "Tr."

tion for a writ of certiorari was filed September 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

### QUESTION PRESENTED

Whether it was reversible error for the trial court to deny petitioner's motion, made after the Government had rested its case, to recall a government witness for further cross-examination for the asserted purpose of laying a foundation for impeaching the witness' credibility.

### STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon con-

> viction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 37 of the Criminal Code (18 U. S. C. 88) reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

## STATEMENT

Petitioner was convicted in the District Court for the Western District of Pennsylvania on three indictments charging two substantive violations of Section 2 of the Mann Act (18 U. S. C. 398) and a conspiracy to violate the Act (see Tr. 430–438).[2] He was sentenced to imprisonment for three years on each of the substantive charges and two years on the conspiracy indictment, the sentences to run concurrently (R. 28). On appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed (R. 33–34).

[2] Copies of the indictments have been lodged in the Clerk's office.

The evidence and proceedings pertinent to the question presented by the petition for a writ of certiorari are as follows:

On December 14, 1944, the first day of the trial (Tr. 2, 73), Madeline Smith, called as a witness on behalf of the Government, testified that on December 10, 1941, she met petitioner and Frank Chessario, a codefendant, in Youngstown, Ohio, for the purpose of obtaining work as a prostitute (Tr. 107–110, 112), that the three of them drove in petitioner's car (Tr. 130) to Meadville, Pennsylvania, and that during the trip petitioner and Chessario told her that she could make a good living in Meadville by engaging in prostitution there at a house on Park Avenue (Tr. 120–121) which they were running and to which they brought her (Tr. 111–112). She further testified that she commenced working at the place as a prostitute and that thereafter on one occasion petitioner paid her for money due her (Tr. 113, 124–125). When asked on cross-examination by petitioner's counsel whether she and petitioner ever had any disagreements and whether she had ever said to him, "I will get even with you," she replied, "I never did" (Tr. 132–133). Mary Jane Michaelchick, a sister of Madeline, testified on behalf of the Government that Madeline introduced her to petitioner in Youngstown in May 1942, that he asked her if she would like to work as a prostitute in one of two houses he owned in

Meadville, and that thereafter one Benny Kaufman and petitioner drove her to a place on West Street, Meadville, where she commenced working as a prostitute (Tr. 184–186, 188–189, 194).

After Madeline and Mary Jane had testified in chief and had been cross-examined separately by petitioner's attorney and counsel for the codefendants, the Government called six other witnesses, offered three exhibits in evidence, and then, shortly after the noon recess on December 15, rested its case (Tr. 197, 207, 224, 234, 242, 254, 260). At this point, counsel for petitioner requested leave to recall Madeline for further cross-examination,[3] stating that he had been informed that at the "inception of this case" she had approached and acted toward petitioner in a manner which indicated bias on her part,[4] and asked that

[3] Just prior to the noon adjournment, petitioner's counsel had addressed the court as follows:

"Mr. Petrillo. On behalf of the defendant Madaffer, we would like in the first place to have some further cross examination of the defendant Shirley Cooper and the witness Madeline Smith; and then also on behalf of Frank Madaffer we would like to make our own witness, the witness Laura Duffy, who is known as Penny, and the witness Martizen for rebuttal, and the witness Sillato for rebuttal."

The United States Attorney then said, "You mean as a matter of defense you wish to call them. Is that correct?" Counsel replied, "Yes, as a matter of defense."

The court made no ruling on this request. (Tr. 253–254.)

[4] The record is silent as to when counsel was first apprised of Madeline's alleged efforts to approach petitioner. The petition states (pp. 5–6) that petitioner brought the matter to the attention of his counsel upon the adjournment of the afternoon session on December 14, following the completion

"on the basis of these facts, which we intend to prove to the court, we have to ask that her testimony be stricken from the record in its entirety, because it is based upon falsehood and prejudice." When the court advised counsel that this matter should be presented as part of petitioner's defense, counsel responded that it was his impression that he was required to lay a foundation for proving the alleged incident by first cross-examining the witness. The court reiterated that counsel would have an opportunity to show that Madeline had attempted to see petitioner as part of his defense. The motion to recall Madeline was accordingly denied. (Tr. 260–264, 286.)

As part of his defense, petitioner introduced the testimony of a hotel detective, who stated that around 12:20 a. m. on December 14, 1944, the day the trial opened, he saw Madeline talking to petitioner through the door of the latter's hotel room, and told her that she would not be allowed to con-

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of Madeline's testimony. Counsel's desire to recall her to the stand was first made known to the court just before the noon adjournment on December 15 (see fn. 3, p. 5, *supra*). It is also asserted in the petition (pp. 7–8) that shortly after he first saw Madeline in the corridor outside the courtroom on the day before the trial opened, petitioner, "being suspicious of Miss Smith's actions, and fearful of possible further wrongdoing on her part, immediately reported the matter to one of the F. B. I. agents, a Mr. Hopkins * * *." In so far as the record shows, however, the only allusion to the asserted disclosure to Hopkins is in the statement by petitioner that he "walked over to Hopkins and asked him if he was using perjured testimony" (Tr. 281–282).

verse there but would have to go to the lobby downstairs, where she might use the telephone. He further testified that he escorted her to the lobby and that from there she carried on a 20-minute telephone conversation with petitioner, no part of which he overheard. (Tr. 269–276.)

Petitioner testified as follows: On December 13, the day before the trial opened, he was in the corridor outside the courtroom when Madeline came along and asked how he was; he told her to go away lest she get into trouble, inasmuch as she was a government witness. She replied that she would not get into trouble, since not she, but Mary Jane, was on his case, and during the conversation she showed him a white card purporting to substantiate that fact. He did not pay much attention to her, but walked over to Mr. Hopkins, an F. B. I. agent, and asked him if he was using perjured testimony (cf. Pet. 8). Later the same day he saw Madeline again in the corridor but said nothing. That evening he went to his hotel room to retire. Shortly after midnight he was awakened by a knock at the door and heard Madeline say, "Let me in"; he refused to open the door and told her to go away. In a few minutes the telephone in his room rang; Madeline was on the wire and told him that if he would come over to her hotel she could perhaps ease his worries, but otherwise she and Mary Jane would "make it mighty hot" for him; he declined to have any-

thing to do with her and returned to bed. (Tr. 279–285.) Petitioner denied that he had ever made arrangements to transport Madeline or Mary Jane, or that he ever had had any connection with the business of prostitution (Tr. 299, 302, 316–317; see also Tr. 329–330, 335).

ARGUMENT

Petitioner contends (Pet. 15–22) that the trial court committed reversible error in denying his motion, made after the Government had rested its case, to recall government witness Madeline Smith for further cross-examination in order to lay a foundation for impeaching her credibility. Counsel argues that it was not until he had concluded his cross-examination of the witness that petitioner apprised him that prior to the trial the witness had approached and told petitioner that if he would see her, she might be able to help him, but that otherwise she and her sister would make it "hot" for him, and that these facts tended to establish an unscrupulous willingness on her part to give false testimony. We submit that the contention and argument are without merit.

It is stated in the petition (pp. 7–8) that on the day prior to the trial Madeline approached and spoke to petitioner in the corridor of the courthouse, and that being suspicious of her actions and fearful of possible wrongdoing on her part, he immediately reported the matter to

one Hopkins, an F. B. I. agent.[5] Elsewhere in the petition (pp. 5–6) it is stated that upon the adjournment at the end of the first day of the trial, "petitioner brought to the attention of his counsel, Edward E. Petrillo, certain actions and statements on the part of said witness Madeline Smith, which occurred during the day and night immediately preceding the opening of the trial"[6] If we accept these statements in the petition, it would seem that petitioner showed greater diligence in disclosing the alleged incidents to the Government than to his own attorney. However, while Miss Smith was being cross-examined by petitioner's counsel, one of the questions asked her was, "You never told Frank Madaffer, 'I will get even with you'?" We submit that this question could very well have been framed upon the basis of information supplied by petitioner that the witness had already displayed her hostility on some occasion or other. But whether petitioner had ever so advised his counsel, the important fact is that the witness answered, "I never did." (See page 4, *supra*.) Inasmuch as the witness thus stated, in effect, that she had never threatened petitioner, it seems clear that further cross-examination would have elicited

[5] The only allusion in the record to the purported disclosure to Hopkins is in petitioner's testimony that "he walked over to Hopkins and asked him if he was using perjured testimony." See page 7, *supra*.

[6] The record is silent as to when petitioner disclosed to his counsel the actions and statements referred to.

no different response to such questioning. Upon the denial of the motion to recall Miss Smith, petitioner took the stand and testified to the alleged incidents concerning which his counsel had sought to question her (*supra,* pp. 7–8). It then became a matter for the jury to evaluate the credibility of the two witnesses and decide whether petitioner or Miss Smith had told the truth. Thus, petitioner was not prejudiced as a result of the denial of his motion seeking further opportunity to attempt to impeach her.

Furthermore, litigants are charged with the responsibility of timely action (See *Gates* v. *United States,* 122 F. 2d 571, 579 (C. C. A. 10), certiorari denied, 314 U. S. 698), and it would seem to be a corollary that any favorable evidence known to them is presumed to be known to their counsel. In addition, the extent of cross-examination with respect to a proper subject of inquiry is within the sound discretion of the trial court, and it may exercise a reasonable judgment in determining when the subject has been exhausted. *Glasser* v. *United States,* 315 U. S. 60, 83; *Alford* v. *United States,* 282 U. S. 687, 694; *Blitz* v. *United States,* 153 U. S. 308; *Storm* v. *United States,* 94 U. S. 76. In the circumstances presented by this record, we submit that the court committed no abuse of discretion when it declined, after the Government had rested its case, to permit further cross-examination of a witness

whom petitioner's counsel had already had ample opportunity thoroughly to cross examine.[7] Cf. *Mears* v. *United States*, 55 F. 2d 745, 747 (App. D. C.).[8]

[7] Petitioner's counsel's cross-examination of Miss Smith covers fifteen pages of the transcript (Tr. 126–137, 146–147, 155), and her cross-examination by counsel for all the defendants covers thirty pages (Tr. 126–155). Such cross-examination searchingly revealed Miss Smith's character as a woman who had long been engaged in prostitution.

[8] Petitioner cites (Pet. 21–22) *Cossack* v. *United States*, 63 F. 2d 511 (C. C. A. 9), as in conflict with the decision below. But there is an obvious distinction between them. In the *Cossack* case, after the Government had rested, the defendant sought to recall a government witness for the purpose of asking a question which would serve as the foundation for the introduction of testimony by another witness calculated to impeach the credibility of the government witness. The court refused to permit the witness' recall, whereupon the defendant attempted to elicit from one of his witnesses the tenor of a conversation which the latter had had with the government witness and which bore on the question of the latter's credibility. The trial court sustained the government's objection to allowing the conversation to be told, on the ground that no foundation had been laid. On appeal, it was held that under the circumstances the trial court committed an abuse of discretion in refusing the defendant's offer to present this evidence to the jury, since the refusal deprived him of a complete opportunity of presenting his case. In the instant case it is true that petitioner was not allowed an opportunity to attempt to prove by cross-examination that the government witness had sought an interview with him before the trial, but the full details of the attempt to obtain an audience were subsequently brought to the attention of the jury by petitioner's own testimony. It is manifest, therefore, that he was given a complete opportunity to present his defense and that he did not suffer the consequences involved in the *Cossack* case.

## CONCLUSION

The case was correctly decided below, and it involves no real conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945